BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAMON G. BROWN	)	
Claimant	)	
	)	
VS.	)	
	)	
JAG II CONSTRUCTION CO.	)	
Respondent	)	Docket No. 1,012,591
	)	
AND	)	
	)	
BUILDERS ASSOC. SELF INSURERS FUND OF KANSAS	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the March 3, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ denied claimant's request for workers compensation benefits because he found that claimant was not in the course of his employment at the time of his accidental injury. Specifically, the ALJ concluded that K.S.A. 44-508(f), commonly referred to as the "going and coming" rule, precluded coverage of the Act because claimant had not yet arrived on the job site at the time of his automobile accident.

The claimant requests review of the ALJ's denial of his request for benefits. Claimant contends that he was on the job from the moment he left his home traveling to the job site and as such, the injuries he sustained in the motor vehicle accident, which occurred one block from the job site, should be held compensable.

Respondent argues that claimant was not in the course of employment when he suffered his injuries. Respondent contends that claimant had not yet arrived at the job site

and was not engaged in the employer's service at the time of the accident. Thus, the claimant is not entitled to benefits under K.S.A. 44-508(f) and the ALJ's finding should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a working construction foreman and was paid an hourly wage. Respondent did not provide a vehicle but paid claimant a weekly truck allowance "for the use of his truck on a job site" while on company time.[1] Gas, some general automobile maintenance and a cellular phone were provided as well. Claimant resides in Lakin, Kansas, and as of March 20, 2003, he was assigned to two separate job sites in Garden City, Kansas, approximately 40 minutes away.

Claimant testified that he was "on the clock"[2] at 6:00 a.m. the morning of March 20, 2003 when he began loading tools into his truck. He then proceeded to drive from his home in Lakin to his first job site for the day in Garden City, Kansas. Before arriving at the job site, he was involved in a motor vehicle accident in which he sustained various injuries.

While at the hospital, claimant was advised that his employer did not consider this matter to be covered by workers compensation because he had not yet arrived at the job site.[3] Thus, the medical bills were submitted to his personal health carrier. Thereafter, in late August or early September, 2003, claimant asserted a workers compensation claim.

At the preliminary hearing, claimant testified as to his belief that he was "on the clock" as of the moment he began loading the tools into his truck. Eric Thompson, the respondent's business manager, testified that it was the company's policy "that hourly people's time start[s] when they reach the job site or the office they work out of."[4] Mr. Thompson reviewed claimant's time cards and found no indication that claimant was including travel time on his time card. In fact, claimant submitted no time card for the day of the accident.

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[1] Thompson Depo. at 6.

[2] P.H. Trans. at 11.

[3] *Id.* at 5,11.

[4] Thompson Depo. at 7.

The ALJ concluded K.S.A. 44-508(f) precluded coverage under the Act. That statute provides as follows:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.

The Board agrees with the ALJ's analysis. The "going and coming" rule, as embodied in K.S.A. 44-508(f) prohibits claimant's recovery in this matter. The evidence suggests that while claimant believed he should be compensated for his travel time, that was not respondent's policy. Moreover, it is clear that claimant's time sheets for the five weeks before his accident did not disclose that he was including his commuting time in his work hours. The Board specifically finds claimant was not in the employer's service during the time he was driving from home to the first work site of the day.[5]

Claimant argues that the "inherent travel" exception applies to the instant action and thereby justifies a reversal of the ALJ's preliminary hearing Order. While the Board acknowledges the cited case law, the Board finds that it does not apply in this instance.

Kansas law recognizes an exception to the "going and coming" rule when driving is either an integral part of, or is inherent in the nature of, or is necessary to the employment.[6] However, the underlying premise of that exception is that the employee is in the employer's service during the travel period, often in a vehicle provided by the employer and actively engaged in the furtherance of the employer's business. A traveling salesperson is the typical example.[7]

Here, claimant was driving to the first job site of the day. Although he testified he had "clocked in", it was not the employer's intention to compensate him for his travel time to the job site. The evidence is disputed as to whether he was carrying his own tools or those of the employer. Nonetheless, the Board finds that while driving is certainly involved in claimant's job, it is only a requisite *after* he arrives at the first site of the day and not before. Under these facts and circumstances, the "inherent travel" exception does not salvage claimant's claim. The ALJ's preliminary hearing Order is affirmed.

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[5] See generally *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[7] See *Schultz v. Big A Auto Parts, Inc.*, Docket Nos. 217,859 and 222,319, 1997 WL 377969 (Kan. WCAB June 27, 1997).

As with all preliminary hearing Orders, it is provided by the Workers Compensation Act, that preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[8]

The parties are once again reminded that it is not necessary to needlessly offer medical records that provide no real evidentiary benefit to either the ALJ or the Board. The record included what appeared to be the entire medical file (nearly an inch thick) generated by the medical providers who treated claimant following his automobile accident. Given the fact that compensability and not causation was the dispositive issue in this matter, it was not helpful to litter the record with this information.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated March 3, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
John D. Clark , Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[8] K.S.A. 44-534a(a)(2).